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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 272

EIKO UEHARA ROSE, PETITIONER

v.

ROBERT S. MCNAMARA, SECRETARY OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 6a–15a) is reported at 375 F. 2d 924. The opinion of the district court (Pet. App. 1a–5a) is reported at 252 F. Supp. 111.

JURISDICTION

The opinion and judgment of the court of appeals were entered on March 23, 1967. The petition for a writ of certiorari was filed on June 20, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a United States citizen tried and convicted in the Ryukyu Islands, who was afforded all

the protections of the Bill of Rights, including indictment by grand jury, trial by petit jury, and representation by counsel, may have her conviction set aside because the court in which she was convicted was not established pursuant to Article III of the Constitution.

2. Whether the President may by Executive Order provide a system of government for the Ryukyu Islands while they are under the temporary control of the United States.

3. Whether juries in the Ryukyu Islands must be composed entirely of American citizens, and whether petitioner's challenge to the composition of the jury which convicted her is timely.

CONSTITUTIONAL PROVISIONS, TREATY, STATUTES AND EXECUTIVE ORDERS INVOLVED

The pertinent constitutional provisions, treaty, statutes and Executive Orders are set forth in the Appendix to the Petition pp. 23a–45a.

STATEMENT

Petitioner brought this action seeking a declaratory judgment that her conviction for evasion of the Ryukyu Islands' income tax was invalid, because the court in which her trial was held was created pursuant to Executive Order, rather than by Congress under Article III of the Constitution.[1]

[1] The numerous other contentions made in the petition were added piecemeal at various stages of the litigation, mostly in a reply brief filed on the day before oral argument in the court of appeals. None were made to the court in which petitioner was tried or to the appellate court, in the Ryukyu Islands; thus the assertion (Pet. 7) that "Petitioner exhausted her rights in Okinawa" is incorrect.

Okinawa, the principal island in the Ryukyu chain, was taken from Japan in the last battle of World War II.[2] During combat operations, and after cessation of hostilities, military government units carried out governmental functions in areas under their control. On April 28, 1952, Japan entered into a peace treaty with the Allied Powers, including the United States. Article 3 of the treaty dealt with the Ryukyus and provided:

> Japan will concur in any proposal of the United States to the United Nations to place under its trusteeship system, with the United States as the sole administering authority, Nansei Shoto south of 29° north latitude (including the Ryukyu Islands and the Daito Islands), Nanpo Shoto south of Sofu Gan (including the Bonin Islands, Rosario Island and the Volcano Islands) and Parece Vela and Marcus Island. Pending the making of such a proposal and affirmative action thereon, the United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters.

3 U.S. Treaties and other International Agreements, Part 3, pp. 3169, 3172–73 (1952), TIAS No. 2490.

On June 5, 1957, President Eisenhower issued Executive Order 10713 (22 F.R. 4007; 3 C.F.R. (1954–1958 Comp.), p. 368), which provided for a dual system of government for the Ryukyus, consisting of

[2] This account is largely taken from the opinion of the Court of Military Appeals in *United States* v. *Vierra*, 14 U.S.C.M.A. 48, 49–50, 33 C.M.R. 260 (1963), in which the constitutionality of the Ryukyu Island courts also was upheld.

a civil administration under the continued jurisdiction of the Secretary of Defense, and a legislature directly elected by the people of the islands.[3]

Section 10 of the Order (22 F.R. 4009–10) similarly provided for a dual system of courts, one system to be maintained by the Government of the Ryukyus (GRI) and a separate one by the civil administration (USCAR). The GRI courts have criminal jurisdiction—

> * * * over all persons except (a) members of the United States forces or the civilian component, (b) employees of the United States Government who are United States nationals even though not subject to trial by courts-martial * * *, and (c) dependents of the foregoing [except for dependents "who are Ryukyuans"].

The USCAR courts have criminal jurisdiction over persons in the excepted classes. In addition the High Commissioner could withdraw criminal jurisdiction from the GRI courts in cases affecting "the security, property, or interests of the United States."

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[3] The Order provided that the head of the civil administration was to be a "High Commissioner" designated by the Sectary of Defense, and that the executive power of the Government of the Ryukyu Islands would be vested in a Chief Executive, who was to be a Ryukyuan, appointed by the High Commissioner after consultation with representatives of the elected legislature. The Chief Executive and the High Commissioner each had, in turn, veto power over legislation passed by the GRI legislature. In 1962, Executive Order 10713 was amended by Executive Order 11010 (27 F.R. 2621, Mar. 19, 1962), to limit the High Commissioner's veto power to cases of unusual importance.

Petitioner's repeated statements that (Pet. 11) the Government of the Ryukyu Islands is "but a creature of the High Commissioner" and (Pet. 13) "but an agency of the United

Although the United States is thus administering governmental functions, including judicial functions, in the Ryukyus pursuant to the Peace Treaty, it continues to recognize those islands as "a part of the Japanese homeland and look[s] forward to the day when the security interests of the Free World will permit their restoration to full Japanese sovereignty."[4] An increasing public demand in Japan and the Ryukyus for a greater Japanese role in their administration has led to the assumption of more responsibility for their economic and cultural affairs by the Government of Japan, increased autonomy for the Government of the Ryukyu Islands, and a Presidential directive calling for "a continuous review of governmental functions in the Ryukyu Islands to determine when and under what circumstances additional functions that need not be reserved to the United States as administering authority can be delegated to the Government of the Ryukyu Islands."[5]

Although the Executive Order stated that it gov-

States" are incorrect. The legislature of that Government is elected by the predominantly Japanese and Ryukyuan population of the islands.

[4] Public Papers of the Presidents—John F. Kennedy, 1962, pp. 247–48 (GPO 1963) (Statement of Mar. 19, 1962, accompanying Executive Order 11010, 27 F.R. 2621). For similar statements see Dept. of State Bull., Vol. 47, No. 1221, p. 770 (Nov. 19, 1962) (referring to "the anticipated eventual restoration of these islands to Japanese administration"); Dept. of State Bull., Vol. 45, No. 1150, pp. 57–58 (July 10, 1961); Dept. of State Bull., Vol. 37, No. 941, p. 52 (July 8, 1957).

[5] Public Papers of the Presidents—John F. Kennedy, 1962 (GPO 1963), pp. 247–48; Exec. Order 11010, Mar. 19, 1962, 27 F.R. 2621; Agreement between the United States and Japan, Economic Cooperation—Ryukyu Islands, TIAS (State Dept., U.S. Treaties and other Internat'l. Agreements) No. 5606 (1964).

erned "except as the Congress may otherwise provide by law," Congress has chosen not to enact substantive laws for the Ryukyus, or to supplant the existing court system. It has, however, appropriated funds to build a courthouse for the USCAR courts and has expressly provided for the disposition of "[f]ines, fees, and forfeitures received by the Civil administration of the Ryukyu Islands."[6] At the same time, Congress has provided that its actions in assisting the administration and development of the Ryukyus shall not "be construed to extend the application of any law of the United States to the Ryukyu Islands which would not otherwise be applicable there." Act of July 12, 1960, 74 Stat. 461, Section 6.

Petitioner was indicted by a grand jury in the Superior Court of the United States Civil Administration of the Ryukyu Islands for attempting—

> to evade payment of incomes taxes in the total amount of about $70,000 lawfully due the Government of the Ryukyu Islands on taxable income derived by her from operations of the Tea House August Moon during the period from about 1 July 1957 to about 30 June 1962, in violation of Article 87 of Government of the Ryukyu Islands Act No. 44, dated 12 October 1952, "Income Tax Law," as amended and supplemented by Civil Administration Ordinance No. 114, dated 21 July 1953, "Ryukyuan Income Taxes," by wilfully, wrongfully, and unlawfully filing with the Government of the Ryukyu Islands false and fraudulent income tax returns * * *.

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[6] See *Hearings Before Subcomm. of the House Comm. on Appropriations, Mutual Security Appropriations for 1960*, 86th Cong., 1st Sess., 169 (1959); Sec. 3, Act of July 12, 1960, 74 Stat. 461.

After a trial at which she was represented by counsel, petitioner was acquitted by a jury of six counts of the indictment, but was convicted of Count 1, which is reproduced in relevant part above. On October 28, 1963, judgment was entered by the USCAR Superior Court, fining petitioner $8,000. Again represented by counsel, petitioner appealed to the USCAR Appellate Court, which affirmed her conviction.

Petitioner's complaint in the United States District Court for the District of Columbia, seeking a declaration that her conviction was "null and void" because the USCAR courts were established pursuant to Executive Order rather than by Congress under Article III of the Constitution, was dismissed after a hearing on cross-motions filed by the parties (Pet. App. 1a–5a). The Court of Appeals affirmed (Pet. App. 6a–15a), rejecting petitioner's attack on the validity of the USCAR court and the numerous other contentions raised for the first time late in the appellate proceedings.

ARGUMENT

Petitioner was accorded every protection of the Bill of Rights at her trial, including indictment by grand jury, trial by petit jury, and representation by counsel. There is no basis for her contention that her trial for evasion of Ryukyuan income taxes could be held only in a court created by Congress under Article III of the Constitution [7] or that the President lacks power

[7] In effect, petitioner claims that by virtue of her residence in the Ryukyus, she is entitled to a right not enjoyed by citizens on the mainland, who cannot demand a trial for evasion of local taxes in an Article III court. Residents of the District of Columbia for example, would be tried for such an offense in the Court of General Sessions. D.C. Code § 47–1589e; cf. *Government of Guam* v. *Kaanehe*, 137 F. Supp. 189 (D. Guam).

to provide for the orderly governing of the Ryukyu Islands, during the interim control of those islands by the United States. The decision below is not in conflict with any decision of this Court or any other court,[8] and further review is not warranted.

1. It is well settled that courts in areas under the control of the United States may be constituted "without regard to the limitations" of Article III, where justified in light of "the particular local setting, the practical necessities, and the possible alternatives", *Glidden Co.* v. *Zdanok,* 370 U.S. 530, 544–548. Thus, in *American Insurance Company* v. *Canter,* 1 Pet. 511, this Court recognized that territorial courts need not meet the requirements of Article III. The argument that judicial power in the territories could only be exercised by judges who pursuant to Article III, hold their offices during good behavior and whose compensation could not be diminished was expressly rejected in *McAllister* v. *United States,* 141 U.S. 174, in which the Court stated that "The absence from the Constitution of such guaranties for territorial judges was no doubt due to the fact that the organization of governments for the Territories was but temporary" (pp. 187–188).

Reid v. *Covert,* 354 U.S. 1, on which petitioner so heavily relies is not to the contrary. In *Reid* the Court held only that an American citizen, not in the military, could not be tried by a military court which did not provide the basic safeguards of indictment and trial by jury. *Reid* did not in any way change the rule that courts in areas outside the United States need not be established as provided in Article III. *Glidden Co.*

[8] The constitutionality of the USCAR courts also was unanimously upheld by the Court of Military Appeals. *United States* v. *Vierra,* 14 U.S.C.M.A. 48, 33 CMR 260 (1963).

v. Zdanok, supra; Abreu v. *United States,* 308 F. 2d 248 (C.A. 1); certiorari denied, 372 U.S. 530; *Fournier* v. *Gonzalez,* 269 F. 2d 26 (C.A. 1). See *Kinsella* v. *Singleton,* 361 U.S. 234, 237.

2. There is similarly no merit to petitioner's contention that the President lacked the power to establish governmental institutions for the Ryukyus. As recently as 1952, this Court recognized that the President's power to provide a government for territories captured during war not only survives the cessation of hostilities but may also survive the signing of a peace treaty; "It may continue long enough to permit the occupying power to discharge its responsibilities fully" *Madsen* v. *Kinsella,* 343 U.S. 341, 360. This power of the President to govern captured territories was first recognized in *Cross* v. *Harrison,* 16 How. 164, where the Court sustained the power of the miltiary to govern California after the Treaty of Peace with Mexico had been signed. In *Cross* the Court concluded that "the civil government of California, organized as it was from a right of conquest, did not cease or become defunct in consequence of the signature of the treaty or from its ratification. We think it was continued over a ceded conquest without any violation of the Constitution or laws of the United States * * * until Congress legislated for it * * *." 16 How. at 194. See also *Dooley* v. *United States,* 182 U.S. 222, 234.

Similarly, in the case of the Ryukyus, the power of the President to provide for the government continues until such time as Congress chooses to act. Here, Congress has not only chosen not to interfere with the government established by the President; it has ac-

tively supported that government through appropriations, including the appropriation for the courthouse where petitioner was tried.[9]

Petitioner's further contention that the President could not lawfully delegate his authority to perform governmental functions in the Ryukyus to subordinates in the executive branch is insubstantial. Since the President has such power, his delegation is one of executive power, not legislative power. Thus, petitioner's lengthy recitation (Pet. 28–32) from cases such as *A. L. A. Schechter Poultry Corp.* v. *United*

[9] Petitioner raises a "welter" of other contentions (Pet. App. 11a) relating to the President's power to govern the Ryukyus, and claims that the decision below conflicts with numerous appellate decisions. Each of these contentions fallaciously assumes the answer to the central question of *whether* the President has authority to govern in the Ryukyus. Petitioner argues at great length (Pet. 32–42) the undisputed proposition that the Constitution has applicability abroad (*Reid* v. *Covert*, 354 U.S. 1), then leaps to the unjustifiable conclusion that the President has identical authority with respect to foreign and domestic affairs. Thus petitioner argues that because the President could not provide criminal laws for (*e.g.*) federal areas in Kansas and Illinois, cf. *United States* v. *Sharpnack*, 355 U.S. 286, 294–295, he had no power to do so for the Ryukyu Islands. But the President's powers in the realm of foreign relations are *not* measured by his powers with respect to domestic affairs. *E.g.*, *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 315–316. More particularly, the President's authority to provide for the governing of ceded or captured territory abroad, has always been regarded as broader than his power to do so for territory incorporated in the United States. *Madsen* v. *Kinsella*, *supra*. The attempt to analogize the Ryukyu Islands to a federal enclave lacks factual or legal basis. Since the USCAR courts clearly do not reflect the discredited view, rejected in *Reid* v. *Covert*, *supra*, that the "Constitution can have no operation in another country" (*In re Ross*, 140 U.S. 453, 464), the purpose of Petitioner's lengthy discussion of that point is obscure.

States, 295 U.S. 495, involving delegations of Congressional powers to administrative agencies, is irrelevant. The President is not required to exercise his authority over the Ryukyu Islands in person, any more than he is required to carry out his other functions in person. *Russell Co.* v. *United States*, 261 U.S. 514, 523; *Sardino* v. *Federal Reserve Bank of New York*, 361 F. 2d 106, 110 (C.A. 2), certiorari denied, 385 U.S. 898.

3. Finally, petitioner's challenge to the composition of the jury which tried her, on the ground that some of the jurors were not American citizens, is neither timely nor sound.[10]

Assuming that petitioner's factual contentions regarding the composition of the jury (for which there is no record support) are true,[11] the legal contention

[10] This contention was not made in the district court, or the USCAR courts. Although in some circumstances a defendant may question the propriety of the composition of the jury for the first time in a collateral proceeding, where the asserted defect goes to the heart of the fairness of the trial (*e.g.*, systematic exclusion of Negroes, see *Whitus* v. *Balkcom*, 333 F. 2d 496 (C.A. 5)), alienage of jurors—if a defect at all in the Ryukyus—"is not fundamental as affecting the substantial rights of the accused", and must be timely raised. *Kohl* v. *Lehlback*, 160 U.S. 293, 301, 302; also *cf. Frazier* v. *United States*, 335 U.S. 497.

[11] Petitioner states that there were "foreign" jurors on the panel (Pet. 43); however, while she proposed to perpetuate testimony to that effect, in a motion (Pet. App. 45a–47a) filed not only after judgment had been entered in the district court, but after a motion for reconsideration had been denied, that motion denied by the court hardly constitutes record support for her factual contention. Petitioner does not directly challenge the court of appeals' ruling that the denial of the motion to perpetuate was no abuse of the district court's discretion (Pet. App. 8a, n. 2). Since the motion offered no explanation

that 28 U.S.C. 1861 requires that only American citizens can sit on juries in the USCAR courts (where most defendants are not Americans) is specious. That provision pertains solely to jurors in United States District Courts, for it refers to citizens who have "resided for * * * one year *within the judicial district* * * *" (emphasis added). See 28 U.S.C. 81–131, defining the "judicial districts" of the federal courts.[12] The Ryukyu Islands are not within any judicial district.

While petitioner baldly asserts (Pet. 43–44) that an American citizen tried in the Ryukyu Islands is constitutionally entitled to a jury composed entirely of Americans, the Constitution itself provides no support for that claim.

While it is true that "alienage" was a ground for challenging a juror at common law, that rule was not applied inexorably, particularly in some of the unincorporated territories of the United States. Indeed, at one time Congressional statutes specifically permitted non-citizens to serve as jurors in such areas. See *Carter* v. *United States,* 1 Indian Terr. 342, 37 S.W. 204, 205–206 (Ct. of Appeals of the Ind. Terr., 1896) (non-citizen Indians are competent grand jurors if otherwise qualified); cf. *Territory* v. *Harding,* 6 Mont. 323,

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why such testimony, if relevant, was not obtained during the nearly one year between the filing of the suit and entry of judgment by the district court, it was properly denied.

[12] Furthermore, it is clear that Congress does not regard provisions of the United States Code to be automatically applicable in the Ryukyus for in Section 6 of the Act of July 12, 1960, 74 Stat. 461, it provided:

> Nothing in this Act shall be construed to extend the application of any law of the United States to the Ryukyu Islands which would not otherwise be applicable here.

12 Pac. 750, 751 (1887) (non-citizens who had declared intention to become naturalized were proper jurors). While normally their strangeness to the area might provide a reason for a disqualification of aliens, this reason would clearly not apply to non-Americans residing in the Ryukyus.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967